

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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Docket No. 77-2106

To Be Argued by:
Gustave J. DiBianco

In The
United States Court of Appeals
For the Second Circuit

LOUIS CHARLES KING,

Petitioner-Appellant,

— vs. —

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court
For the Northern District of New York

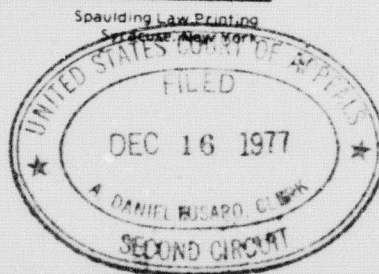
BRIEF FOR RESPONDENT-APPELLEE,
United States of America

PAUL V. FRENCH
United States Attorney for the
Northern District of New York
Attorney for Respondent-Appellee
369 Federal Bldg. & Courthouse
100 South Clinton Street
Syracuse, New York 13202
Telephone: FTS 950-5165
Commercial: (315) 423-5165

Gustave J. DiBianco
Assistant United States Attorney
Of Counsel

Daily Record Corporation
Rochester, New York

(9364)



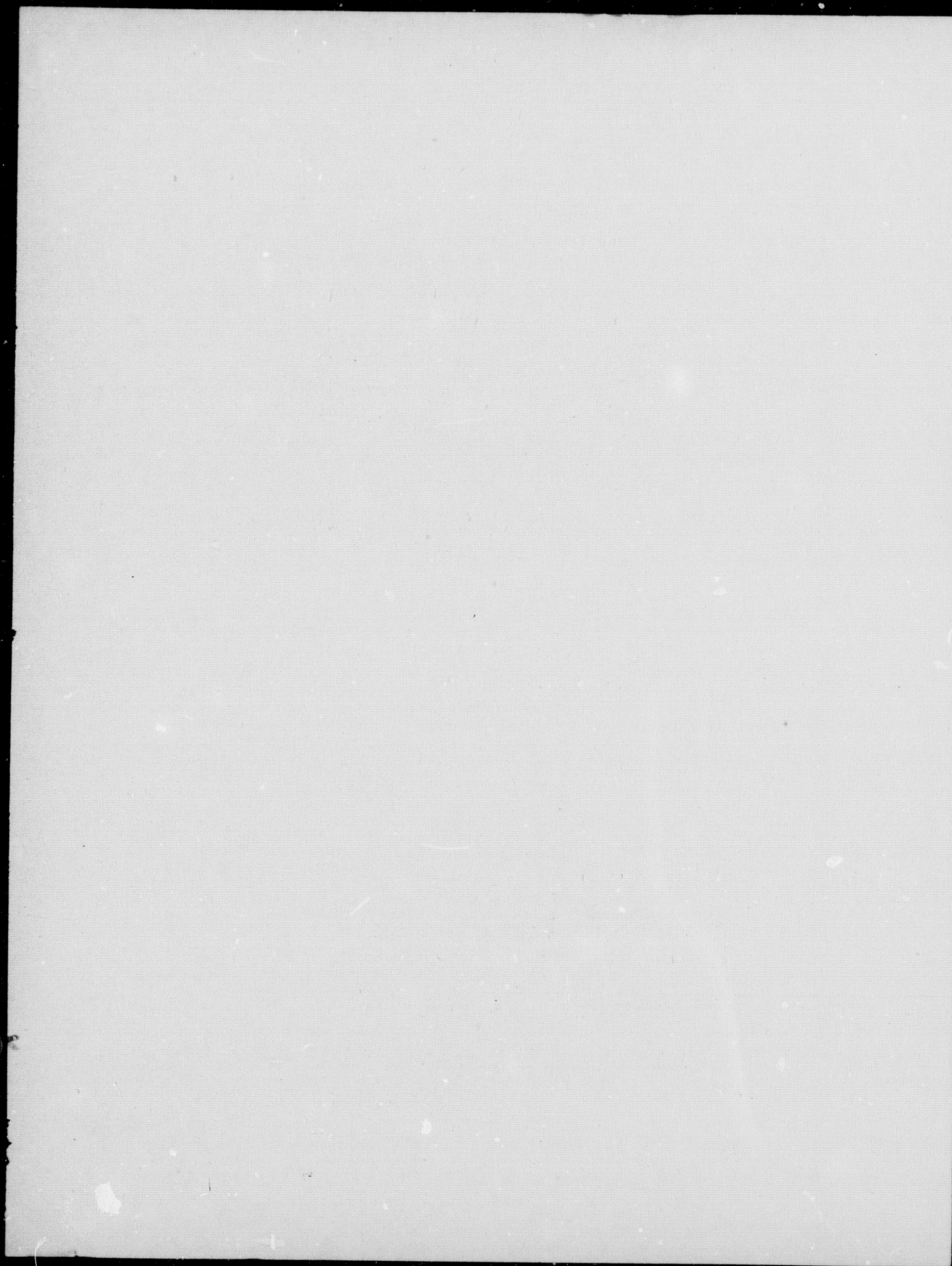


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BRIEF FOR RESPONDENT-APPELLEE,
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STATEMENT OF ISSUES

1. Should the trial judge have disqualified himself from ruling on King's §2255 petition?
2. Have the issues raised in this appeal been previously litigated by direct appeal or by §2255 application?
3. Is any showing made that prejudicial publicity reached the sequestered jury and is there any necessity for a hearing?
4. Does the alleged hearsay statement of a trial juror contain anything indicating a need for further inquiry?
5. Do the alleged hearsay declarations of a motel manager contain anything new, substantial, or significant?
6. Is King chargeable with the foreseeable consequences of his voluntary criminal act of throwing a hand grenade into the home of an FBI Agent?
7. Is any showing made of the use of excessive physical

force against King? Did King miss any significant portion of his trial?

8. Is there any necessity for depositions or any other type of discovery?

STATEMENT OF THE CASE

In early 1973, appellant Louis Charles King (hereinafter "King") was named in each count of a seven count indictment charging violations of 18 U.S.C. §§892 and 894 -- the making of an extortionate extension of credit, and using extortionate means to collect the extension of credit. (73-CR-9, Northern District of New York).

On March 1, 1973, after a jury trial of approximately seven days before Hon. Lloyd F. MacMahon, King was convicted on all seven counts and was thereafter sentenced to a prison term which he is presently serving. Because of injuries sustained by King during trial, sentencing was delayed for approximately three months and on May 25, 1973, King was sentenced to pay a \$10,000 fine and 20 years imprisonment on each count, all to run concurrently. King was tried and convicted along with three other individuals and the convictions of all four defendants were affirmed by this Court, without opinion, at 486 F.2d 1397 (1973), cert. denied, 416 U.S. 958, 91 S.Ct. 1974 (1974).

In April of 1975, a joint application on behalf of all four defendants (King, Talerico, Zogby and Mazza) was filed

under 28 U.S.C. §2255. The Government filed a response in May of 1975 and the motion was denied in September of 1975 by Hon. Lloyd F. MacMahon, the trial judge.

On January 7, 1977, a motion pursuant to 28 U.S.C. §2255 was filed by King and on January 13, 1977, Hon. Lloyd F. MacMahon ordered the United States to respond. On February 1, 1977, the United States filed a motion to enlarge its time to answer petitioner's motion and on February 10, 1977, Judge MacMahon, based on King's consent, extended the Government's time to respond to King's motion to and including March 21, 1977.

On July 29, 1977, Judge MacMahon filed an opinion and order in which he denied all relief requested by King's petition. (App. 163-190). This appeal follows from the denial of the §2255 petition.

STATEMENT OF FACTS

The Government contends that an examination of the files and records of this case will conclusively show the following facts.

As a result of an extensive investigation into loan shark-

All references to "App." refer to the Appendix filed by Appellant King. The Government has not filed any Appendix.

All references to "Trial Tr." refer to the original Trial Transcript filed with the Clerk of the Court.

ing, conducted jointly by the Syracuse and Utica office of the Federal Bureau of Investigation ("FBI"), the Utica office being under the direction of Special Agent J. Lewis Kelly, Senior Resident Agent, petitioner King and three co-defendants were indicted on charges of making extortionate extensions of credit and using extortionate means to collect extensions of credit, in violation of 18 U.S.C. §§ 892 and 894.

Trial commenced at Utica on February 20, 1973, and all defendants remained free on bail. At the outset, the Government moved to sequester the jury, based upon a showing that sequestration was necessary to insulate the jury from anticipated prejudicial publicity; there were plots to kill the principal witness (the victim of the loan sharking) and one of the defense attorneys, to bribe a judge and jurors, and to engage in other criminal acts, including subornation of perjury and obstruction of the trial.

The trial proceeded for three days without any extraordinary incident, but during the weekend recess, late on Saturday night, February 24, 1973, an automobile stopped in front of Agent Kelly's home; King got out, walked across the front lawn, smashed the front window and deliberately threw a hand grenade into Kelly's living room. There was a flash, and King ran toward the automobile. Agents or police officers, on the scene guarding Kelly's home, exchanged shots. King was wounded but managed to get back into the automobile and escape. Followed, he was found some minutes

later in the parking lot of the Ramada Inn, several miles away, where the jury had been sequestered since the beginning of the trial. Again, shots were exchanged; King was seriously injured and was taken to nearby St. Luke's Hospital. Another explosive device was found on his person before he was taken to the hospital.

The jury ultimately convicted King and his co-defendants on the loan sharking charges. King now petitions for habeas corpus relief under 28 U.S.C. § 2255, seeking to vacate his judgment of conviction and sentence and requesting various other forms of relief. He grounds his petition on allegations that (a) the jury was actually or possibly exposed to prejudicial publicity concerning the bombing and shooting incidents, and (b) law enforcement and/or government agents used excessive force which deprived him of his constitutional right to be present at the trial.

When court reconvened on Monday morning, defense counsel and the Assistant United States Attorney reiterated the substance of the events of Saturday night. All defendants moved for a mistrial, and King's attorney also moved for severance, stating that the physician treating King had indicated it would be at least two months before King could appear in court. The trial judge denied the motions, made a tentative finding, on the basis of the attorneys' statements and subject to a subsequent evidentiary hearing, that King had voluntarily absented himself from

the proceedings, and continued the trial in his absence. The trial judge also denied counsel's motion to voir dire the jury to determine whether they had learned of the events of Saturday.

The marshals in charge of the jury had been instructed from the outset of the trial to insulate the jury from all media publicity about the case and had assured the court that its instructions in that regard had been followed. The marshal also assured the court that the jury, sequestered on the opposite side of the motel from the parking lot where the shooting occurred, had not become personally aware of the fracas and had not seen or heard any publicity concerning it. The trial judge, in addition, issued stern warnings to the jury, on at least nine occasions, not to talk with others about the case or to allow themselves to be exposed to any media coverage of any kind concerning the case. (Trial Tr. 207, 208, 477, 595, 654, 742, 814, 961, 1025). The news media were, of course, aroused by the grenade-throwing and shooting incidents, and those events were widely publicized.

Counsel continued vigorously to represent King through the remaining phases of the trial. He stated that King wished to testify at the hospital in his own behalf. At counsel's request and in the presence of all counsel, the court carefully interrogated King's attending physician, Dr. Millet, and visited King at his bedside to assure that he was able to testify and that there was nothing about King's appearance to shock or prejudice the jury. The court carefully noted the physical condition of King and his

appearance and made its observation part of the trial record (Trial Tr. 831, 832). Satisfied that he could testify, the trial judge convened a special session of the court and jury in the hospital, where King testified from his bed. The record shows that King testified in his own behalf fully and completely (Trial Tr. 834-857) and was asked only sixteen questions on cross examination by the Government (Trial Tr. 858-859) and was not cross-examined by other defense counsel. The jury was not told the reason for King's hospitalization. The Court specifically cautioned the jurors that they should not speculate as to the cause of his injuries and told the jury, simply, that Mr. King was injured over the weekend.

The record shows that King testified on the morning of February 27, 1973 (Trial Tr. 834-857) and that the case was concluded that same afternoon (Trial Tr. 867). The trial continued and was concluded, the jury deliberated for some thirteen hours and returned a verdict of guilty against all defendants on all counts. The trial judge denied counsel's motion for a new trial and thereafter, conducted an evidentiary hearing, at which an agent present at the grenade-throwing incident testified to the events already recounted. King and his co-defendants declined to present any evidence but rested on the Government's proof. The court concluded that King had, through his own voluntary acts, started the foreseeable chain of events resulting in his hospitalization and consequent absence from the trial.

The trial record shows that the incidents in question were not the first indications that efforts would be made to sabotage the trial. After hearing sufficient evidence about the threats, plots, and other problems, the trial court undertook the extraordinary measure of sequestration. Judge MacMahon concluded that sequestering the jury was appropriate for the reasons stated above and because King's attorney represented that he feared that Marrone, a severed co-defendant, would bring and use a gun in the courtroom.

The record shows that King later pled guilty to possession of the hand grenade, and admitted throwing it through Kelly's window. The Government contends that King's "Statement of Facts" is replete with characterizations and distortions that are in complete variance with the extensive files and records of this case. We wish to comment specifically on King's "Statement of Facts" to show how we reach the conclusion that it distorts the record beyond reality.

King, for example,

- 1) characterizes J. Schuyler Sackman as a "recipient" of an extortionate extension of credit and refers to "criminal statutes alleged to have been involved herein . . . " (emphasis added). (App. 9, Brief p.6)
- The evidence indicates, and the jury found, that Sackman was the victim and that the statutes were violated.

- 2) refers to Sackman "instigating" a loan to himself while an informant and "cunningly interweaving petitioner King into the prosecution" (App. 9, Brief p. 6). The jury verdict expressly rejected this view.
- 3) refers to ". . . the Government's tactics in permitting and encouraging Sackman to ensnare "petitioner" (emphasis added), (App. 29). The trial jury rejected King's defense that he was "ensnared".
- 4) characterizes the jury deliberation of approximately 24 hours excluding time for sleep and meals as ". . . causing the jury difficulty in arriving at its verdict (emphasis added) (App. 29). In view of the number of defendants, the complexity of the statute, and the length and complexity of the trial, such a characterization is baseless.
- 5) refers to newspaper accounts of ". . . an event which allegedly occurred on the prior evening" and states that King "allegedly had sought to throw a live hand grenade . . . into the home of J. Lewis Kelly, the agent in charge of the Utica FBI Office." (emphasis added) (Brief p. 7.) The record is crystal clear since at trial a hearing was held which established that the "event" did occur and King did indeed throw a hand

grenade. Moreover, King later pleaded guilty to possession of the hand grenade and admitted that he threw the hand grenade (Tr. of Sentencing, Nov. 30, 1973. p. 8).

King's application to Judge MacMahon is replete with statements concerning the possible existence of certain facts and statements about which, according to King's version, there can be "no doubt". It is respectfully contended that these "possibilities" are just that; totally unsubstantiated possibilities which are completely meaningless.

King, for example, states that:

the possibility exists that the jury received first hand knowledge (emphasis supplied) App. 47.

. . . It may have been possible for a person to see . . . some of the police cars that arrived . . . (emphasis supplied) App. 52.

. . . the possibility that if a juror had some reason to make an inquiry at the desk, it might have been possible . . . (emphasis supplied) App. 52.

The Government contends that the assertion of these "possibilities" amounts to sheer unsubstantiated speculation, without foundation in fact. Therefore, they are unworthy of consideration by this court.

We make one final comment on King's factual statements about the existing record. King states that he ". . . became involved in an incident with FBI and local law enforcement officers . . ." King never states, through careful avoidance of

the issue, how, and more importantly why, he "became involved". Indeed, this benign characterization of his act of violence in attempting to murder an FBI agent cannot be reduced, by any stretch of the imagination, to a mere "incident". King did not "become involved" -- he voluntarily, willfully, and with premeditation, visited the home of an FBI agent, smashed a living room window, and threw a hand grenade through the living room window. King characterizes this cold-blooded act of violence as an "incident". King, of course, has admitted possession of this hand grenade, has admitted throwing the hand grenade through Kelly's window, and has admitted the facts and circumstances surrounding his possession of this destructive device. (Tr. of Sentencing, Nov. 30, 1973).

The Government contends that King's benign, novelistic version of the "facts" is completely refuted by the files, transcripts, and records of this case. It cannot and should not be accepted on its face by this court. King's subsequent indictment and his plea of guilty, coupled with the extensive documentation of these "incidents", show conclusively that King's version conflicts totally with the extensive records of this case.

Because King's "version" of the facts does not contain any new competent evidence it was properly rejected by the trial court.

We agree with Judge MacMahon's view that

the actual facts are materially different from the hearsay, conclusory, speculative, spurious and distorted version set forth in King's petition. (App. 164)

POINTS

- I - THE TRIAL JUDGE CORRECTLY RULED THAT DISQUALIFICATION WAS NOT REQUIRED OR APPROPRIATE.
- II - THE ISSUES RAISED HEREIN HAVE BEEN PREVIOUSLY LITIGATED.
- III - THERE IS NO SHOWING THAT PREJUDICIAL PUBLICITY REACHED THE SEQUESTERED JURY, AND THERE IS NO NEED FOR ANY HEARING.
- IV - THE ALLEGED JUROR STATEMENT IS CONFUSED, AMBIGUOUS, INCOMPETENT HEARSAY AND IS DEFICIENT ON ITS FACE.
- V - THE ALLEGED ORAL STATEMENTS OF A MOTEL MANAGER ARE INSIGNIFICANT, ARE INCOMPETENT HEARSAY, AND AMOUNT TO PURE SPECULATION.
- VI - KING MUST BEAR THE DIRECT CONSEQUENCES OF HIS VOLUNTARY WILLFUL CRIMINAL ACT.
- VII - THERE IS NO SHOWING THAT EXCESSIVE PHYSICAL FORCE WAS USED AGAINST KING WHICH CAUSED HIM TO MISS ANY SIGNIFICANT PORTION OF HIS TRIAL.
- VIII - THE TRIAL COURT CORRECTLY RULED THAT BROAD DISCOVERY, INCLUDING DEPOSITIONS, WAS UNNECESSARY.

POINT I -- THE TRIAL JUDGE CORRECTLY RULED THAT DISQUALIFICATION WAS NOT REQUIRED OR APPROPRIATE

Judge MacMahon's opinion carefully considers 28 USC 144 and 455 and after analyzing each, reaches the correct conclusion that disqualification is unnecessary.

King's affidavit is clearly insufficient to support a charge of personal bias and the trial record is clear that King was not singled out for unfair treatment nor was he the object of any prejudice. Whatever knowledge Judge MacMahon gained was in his judicial capacity and did not stem from any extra judicial sources; his decision is based on the files and records of the case. King's letter (App. 290) is insignificant and harmless.

Judge MacMahon's reference to Laird v. Tatum on page 13 of his opinion (App. 175) is completely unnecessary to his decision not to disqualify himself. The opinion deals with all the elements of Sections 144 and 455 and concludes that there is no basis under either statute for recusal. United States v. Wolfson, 558 F.2d 59, does not alter the result reached by Judge MacMahon since he does not reach his decision about disqualification on the "duty to sit" notion.

King's assertion of personal bias might have some shred of credibility if there were something in the record that demonstrated, in some way, personal bias or prejudice against him. The record is devoid of any such material.

In King's argument for assignment of a different judge, he contends that

. . . only a small part of the existing trial record is concerned with the facts relevant to the petition. (Brief 29).

Such a contention is a statement without substance. To properly view King's petition one must review the entire trial transcript, the extensive appellate briefs, the prior 2255 motion, the detailed 2255 motion underlying this appeal, and the Government's response to these applications. The waste of judicial resources is obvious.

King's attempt to shift the burden of proof on this issue to the trial judge, must fail, since King fails to supply any evidence of personal bias. The affidavit submitted by King is not sufficient within the meaning of 28 U.S.C. Sections 145 and 455 and does not require the District Judge to disqualify himself.

Due to the inherent disruption of the judicial process involved, the sufficiency of affidavits of disqualification must be strictly scrutinized. United States v. Womack, 454 F.2d 1337, 1341 (5th Cir. 1972). This is especially true when the affidavit is presented in a 28 U.S.C. Section 2255 application. An important purpose underlying Section 2255 is to make use of the trial judge's familiarity with the proceedings when deciding attacks on convictions. Mirra v. United States, 379 F.2d 782, 788 (2d Cir. 1967), cert. denied, 389 U.S. 1022 (1967). Disqualification of the trial judge in a Section 2255 proceeding is completely antagonistic to this purpose.

Disqualification based on the trial judge's status as a potential witness is completely premature at this stage. Only if it is determined that a hearing on petitioner's 2255 application is required, and only if the judge's testimony will be material and relevant to the issue on which the hearing is granted, will his Honor's status as a witness become material. Panico v. United States, 2 F.2d 1151, 1156 (2d Cir. 1969), cert. denied, 397 U.S. 921 (1970). Recusal prior to that time is not required in any Circuit and has, as its sole effect, a loss of judicial resources associated with assigning a new judge unfamiliar with the proceedings. King asserts that the trial judge's refusal to poll the jury regarding exposure to extra-judicial information evidences personal bias. Additionally, King contends that the variation in sentence between himself and the other defendants proves personal bias. In fact, these decisions during the course of the proceeding are no more than rulings adverse to King which clearly are not grounds for recusal. Ex parte Am. Steel Barrel Co., 230 U.S. 35, 44 (1913); United States v. Schwartz, 535 F.2d 160, 165 (2d Cir. 1976). Although King's 20 year sentence cannot realistically be characterized as severe since a sentence up to 140 years was possible, even imposition of a severe sentence, if within legal limits, does not establish personal bias or prejudice. Knapp v. Kinsey, 232 F.2d 458, 466 (6th Cir. 1956).

The trial judge's comment at sentencing, that the evidence shows King to be vicious and violent, does not show personal bias,

United States v. Sclafani, 487 F.2d 245, 255 (2d Cir. 1973); and, moreover, is amply supported by the trial record which showed King was the most culpable of all the defendants. The trial record showed, and the jury decision accepted, that King arranged the violent brutality that was used to extort the loan repayments from the victim while King pretended to be the victim's friend. Perceptions obtained by a judge, based upon what he has learned through judicial participation in the case, cannot amount to disqualifying bias or prejudice. United States v. Grinnel Corp., 384 U.S. 563, 86 S.Ct. 1968 (1966). United States v. Womack, 454 F.2d 1332 (5th Cir. 1972), which King cites in his petition, is not to the contrary. In Womack, the court relied on two affidavits. The first recited the judge's statement that everybody admitted defendant was a shady character. The second, and most important for purposes of the recusal request, indicated that in a pretrial conference the judge stated that "the court was convinced appellant was guilty." 454 F.2d at 1341. Womack does not support disqualification based upon an isolated comment by the trial judge on the evidence.

In Womack, of course, the comments by the trial judge were made prior to the trial of Womack and could be viewed as a pre-conceived notion of the defendant's guilt. In the context of this petition, Judge MacMahon's comment was made after a long trial and upon sentencing of Mr. King, some three months after trial. Here, Judge MacMahon had the benefit of a complete

detailed presentence report and had the benefit of a hindsight view of the entire trial. His comment on the evidence at that state of the proceedings was completely justified.

It should be noted that both King and his trial counsel had full opportunity to dispute Judge MacMahon's statement about the trial evidence and both failed to dispute the judge's statement in any manner. Now, some four and one-half years after sentencing and almost five years after trial, King attempts to rely on a single comment on evidence, by a trial judge, after a lengthy trial. The Government contends that his reliance is totally misplaced. Furthermore, our research has disclosed no case in this Circuit where a judge's language during the course of a judicial proceeding has been so jaundiced as to require his recusal.

The rule of law, without belaboring the point, is that what a judge learns in his judicial capacity -- whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both -- is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification. United States v. Bernstein, 533 F.2d 775, 785 (2d Cir. 1976).

The failure of the trial judge to remove petitioner's name from the prior petition, pursuant to 28 U.S.C. Section 2255, does not show personal bias. Although the trial judge is charged with knowledge of petitioner's request, assuming it was in the file as alleged, there is no allegation that the trial judge was, in fact, aware of said request. Without an allegation of

such actual knowledge the assertion of bias resulting therefrom has no factual basis as required by Section 144. However, even if such an allegation were present, it merely amounts to a claim of error not cognizable in a Section 144 claim. Ex parte Am. Steel Barrel Co., supra.

King alleges that the letter forwarded to the Clerk of the Court "is likely to prejudice Judge MacMahon's view of the petitioner." (App. 80). The letter is innocuous, merely containing an interpretation of law, and it is unsigned. No bias or prejudice could result from such a letter even if it were signed and sent by the petitioner. United States v. Birrell, 276 F.Supp. 798, 809 (S.D. N. Y. 1967). It is simply nonoffensive.

King says that United States v. Robin, 553 F.2d 8 (2d Cir. 1977) provides authority for his request that Judge MacMahon be disqualified from hearing his 2255 petition. The Government respectfully disagrees.

Robin, supra, is distinctly different from the instant case in a number of important ways. Firstly, the proceeding bringing Robin to this court was a guilty plea not, as in this case, a full, week long trial, almost five years ago. As this court stated,

The importance of the presentence report and the Cunningham memorandum in this particular case cannot be overemphasized in view of appellant's plea of guilty. The absence of a trial prevented the judge from acquiring that familiarity with the case and the defendant which frequently aids immeasurably at

sentencing. Moreover the judge was also deprived of the benefit of defense counsel's cross-examination of witnesses and presentation of evidence at trial . . . (545 F.2d 775, 780). (emphasis supplied)

Here, of course, Judge MacMahon had those benefits this court speaks of; that is, a full trial, familiarity with the case, and observation of multiple cross examination of witnesses and King's extensive defense (Trial Tr. 834-857).

King does not point to any appearance of unfairness that requires correction since the record contains none. In view of the absence of the appearance of unfairness, reassignment to another judge would, of necessity, mean a waste of judicial resources. Judge MacMahon has, as a basis for his extensive opinion (App. 163-190), reviewed the extensive files and records of this case. Clearly, there is no valid reason for having another judge do the exact same work.

King does not point to any "previously expressed findings determined to be erroneous" since there are none. Judge MacMahon's rulings and findings have already been affirmed by this Court (App. 226). Since there are no detailed findings based on evidence erroneously admitted, there is simply no logical basis to refer this petition to another judge.

There is nothing in the files and records of this case which remotely suggests personal bias or prejudice so as to

give the appearance of injustice. The record is without any hint of personal animosity toward King and therefore reassignment to another judge would be completely wasteful.

King's attempts to show any reasons for disqualification fail simply because there is no support in the record for the arguments he advances.

POINT II - THE ISSUES RAISED HEREIN HAVE BEEN PREVIOUSLY LITIGATED

King claims that his appeal to this court did not cover the contention that he was denied confrontation of the witnesses against him and thereby deprived him of his Sixth Amendment rights. The Government disagrees -- King, at page 181 of his Appendix, reproduces his appellate brief. Point VI of King's appellate brief covers precisely the contention that he was denied access to his trial. This contention was answered in the Government's appellate brief and we must conclude that this Court, in affirming King's conviction, rejected those contentions.

In the January 7, 1977 motion to Judge MacMahon, King's "Statement of Facts" refers to four areas of the trial that have been completely and fully litigated at trial level and direct appeal. These four areas concern:

- a) medical condition of petitioner -- request for continuance of trial. (App. 30, 32)
- b) allegations concerning exposure of jury to publicity. (App. 31)
- c) King's absence from the trial. (App. 33, 34, 35 and 38)
- d) presence of deputy marshals in the courtroom. (App. 36)

As is demonstrated by the briefs filed with this court, (App. 163-225), all of these issues have been previously litigated and petitioner has been uniformly unsuccessful.

The fact that King in his appellate brief argued that he was "shot by members of the Federal Bureau of Investigation or the State Police" and that he now states that "excessive force" was used is of no moment. The crucial factor is that he was caused to be absent from his trial, and the cause of that absence was his own willful, voluntary, criminal act to which he has pleaded guilty. The trial court in this case took a lengthy recess to allow King's counsel to prepare with King to conduct a hearing into this precise issue and they refused to participate in that hearing which was held anyway. (Trial Tr. 1042-1043 and 1073). The trial judge's determination respecting King's conduct was affirmed completely. Again, his argument now is simply an embellishment of an argument previously rejected.

King also claims that the appellate court was not asked to consider the issue of actual exposure of jurors to publicity. King has already argued the issue of prejudicial publicity strenuously to this court. (See App. 184-190). The issues of

- a) the shootout at the motel,
- b) the presence of extra deputy United States Marshals, and
- c) the possession of newspapers by the jury

were presented in King's appellate brief and were rejected.

King claims that he successfully withdrew from the prior 2255 motion (App. 258) and that he was not a proper party to the earlier motion. This, he argues, should not bar his present 2255 motion.

Regardless of whether he properly withdrew from the earlier motion however, the entire record, including King's exhibits on this application, demonstrate his abuse of the process and his present application should be denied.

In Sanders v. United States, 373 U.S. 1, 18 (1963), the Court stated:

. . . if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.

The Court goes on to say, federal courts should not tolerate this kind of piecemeal litigation.

In light of this, the Government submits that the present petition is an attempt to abuse the process and conduct piecemeal litigation.

"Lou, our understanding was that a sort of affirmation hearing was to be held with either Jimmy or Jack as the party.

* * *

I also prefer that the Court and the U. S. Attorney's Office remain in the dark as to my intentions on future legal process." (App. 290).

It is clear that King wanted the others to file first without him and then after seeing the results of their motions, he could file a successive motion in violation of the successive motion prohibition and thereby cause the kind of piecemeal litigation this Court should not tolerate.

Assuming that King did withdraw his earlier application, King's present application contains very little that is new and, we submit, nothing that requires any different disposition. The first additional ground advanced -- that of an "executed and witnessed statement of a juror . . .", will be discussed in Point IV of the Government's brief. The Government contends, very simply, that the purported juror statement, which is obviously a questionnaire of some type, is defective and insufficient on its face.

Assuming once again that King did successfully withdraw his initial application, the second additional ground advanced, namely, the "unnecessary use of deadly force", has been completely litigated in direct appeal to this Circuit and was rejected by this Court. See brief of appellant King--Point VI, and brief of United States--Point I. (App. 191-194 and 201-204, respectively).

As discussed below in Point VII of this brief, the argument of "excessive force" as opposed to "force" is simply an embellishment of a specious argument previously rejected. As Judge MacMahon correctly stated,

the issues arising out of this bizarre series of events have been fully litigated on at least two other occasions. (App. 175).

POINT III - THERE IS NO SHOWING THAT PREJUDICIAL PUBLICITY
REACHED THE SEQUESTERED JURY, AND THERE IS NO
NEED FOR ANY HEARING

King cites Machibroda v. United States, 368 U.S. 487 (1962), for the proposition that he is entitled to an evidentiary hearing as to the factual issues raised by the purported juror's statement and the alleged statements of Mr. Wakeel. As any reading of Machibroda shows, the affidavit in support of the 2255 motion in that case was extremely detailed, extremely lengthy, and set forth a multitude of specific factual allegations giving names, dates, times and places.

Here, of course, there is no such affidavit. The purported statement of Mrs. Postal (App. 307) is hopelessly vague -- it is in questionnaire form, unsworn, and is ambiguous -- and lacks detail as to every important fact. The purported statement is clearly insufficient when it states that "I did make or I did receive one or more telephone calls" and "As best as I can remember." The statement was obviously prepared with blank spaces and cannot be said to be the juror's own statement when it contains easily misplaced check marks where crucial detailed facts should appear. The statement contains handwriting in only one paragraph out of the eight -- the handwriting there being simply the name of the juror. The statement is, at best, confused, ambiguous and exceedingly vague. In Machibroda, the files and records in the trial court were practically nonexistent, since the conviction was based upon a plea of guilty. In contrast, the conviction in this case is based upon a full

trial in which the defendant King put in a defense that was obviously rejected by the jury. There can be no comparison between the factual background of Machibroda and the factual background of the instant petition. Machibroda contained a strong dissent by Justices Clark, Frankfurter, and Harlan, but even the majority opinion at 496 states that the basis of their opinion is

the specific and detailed factual assertions of
the petitioner

which is highlighted and mentioned throughout the majority opinion. The majority opinion in Machibroda is very clear that the basis of their opinion is that

The petitioner's motion and affidavit contains
charges which are detailed and specific.
(368 U.S. at 495).

On this record it is his right to be heard.
(emphasis added).

With equal force the majority in Machibroda declares that

The language of the statute does not strip the
district courts of all discretion to exercise
their common sense. (368 U.S. at 495),

and the ruling in this case does not imply that the record must conclusively contradict a petitioner's claims in order for a trial judge to deny a full hearing.

The Government contends very simply that the alleged statements which form the basis of King's claims in this motion are incompetent hearsay, hopelessly vague, patently confusing, and insufficiently detailed to support any action by the trial

court at this state of post-trial proceedings.

King cites United States v. Valenciano, 495 F.2d 585 (3rd Cir. 1974), as standing for the proposition that he is entitled to a hearing on his 2255 application. The facts in Valenciano are very similar to Machibroda in that both involved a guilty plea rather than a trial, both involved extremely bare records or transcripts and both involved matters outside the record. The Government respectfully contends that any reliance on Valenciano is misplaced for the same reasons stated under our view of Machibroda.

King claims that the only evidence in the record concerning the insulation of the jury from the publicity of the shooting incident is the fact that the jury was sequestered. King ignores the evidence in the record that the Court, at each recess, admonished the jury sternly not to read newspapers, view television coverage or talk about the case. The Court coupled that admonishment with a threat of contempt of court for disobedience. (App. 23) It is respectfully contended that this is more than ample evidence that the jury did not learn about the shooting incident, since the alleged statements by Mrs. Helen Postal, Michelle Malina, and the hearsay declarations of Mr. Wakeel are, for the reasons stated, patently insufficient to show otherwise.

King cites Gafford v. Warden, 434 F.2d 318 (10th Cir. 1970), in which a 2255 application was filed based upon an affidavit

of a juror indicating that one or more jurors deliberately conducted their own investigations, beyond the trial evidence, about two facts which apparently were critical in the jury deliberations. A hearing on a motion for a new trial was held but at the hearing the court ruled that the defendant's attorney could not question the jury concerning these allegations. The court concluded that the affidavit was incomplete, that its truthfulness was suspicious and that the jury had been instructed on numerous occasions to consider only evidence presented in open court. The Court of Appeals reversed this holding and remanded the case because "questions of fact were disposed of without an evidentiary hearing". The holding of the Circuit Court is based clearly on the fact that it considered the specific, detailed allegations of prejudicial, extrajudicial information contained in the juror's affidavit worthy of a hearing. The Appellate Court ruled that the allegations presented in the juror's affidavit were specific and detailed enough to warrant a hearing.

Here, of course, there is no juror affidavit and, as is patently obvious, the purported statement of a juror lacks specificity, lacks essential detail, is in unacceptable questionnaire form and is ambiguous when it refers to alternative fact situations, e.g., "I did make or I did receive one or more telephone calls . . . " (emphasis supplied). The purported juror statement is clearly unreliable as exemplified

by the statement that " . . . trial resumed on Tuesday, the 27th of February, 1973 . . . ". The record indicates that trial resumed on Monday, February 26, 1973. The juror statement appears to be dated some 2-1/2 years after the jury verdict. It is respectfully contended that the passage of 2-1/2 years cannot render recollections about a trial reliable, in that the news events immediately after the trial could be easily confused with news events occurring during the trial.

The record shows that the court had before it evidence that the defense would attempt to influence the trial jurors during the trial. Those attempts were completely frustrated when the jury was sequestered. A hearing now, some five years after trial, would only subject those jurors to new dangers for no good reason. The instant motion does not make a sufficient showing that a hearing is required when weighed against the danger that someone with an interest in the outcome of this case may, once again, attempt to reach a juror and especially when balanced against the fact that the matter is the result of King's own deliberate criminal conduct.

PRESUMPTIVE PREJUDICIAL PUBLICITY

King asserts that Patterson v. Colorado, 205 U.S. 454, 462 (1907) is support for a finding of presumptive prejudicial publicity. While the proposition set forth by Justice Holmes in Patterson v. Colorado cannot be disputed, the proposition is a general rule of the widest possible magnitude and simply

sets forth the optimum manner in which our jury system should function.

In Remmer v. United States, 347 U.S. 227, 229 (1953) the court was faced with a direct communication to a trial juror which could easily have been interpreted by that juror as a bribe. In addition to that prejudicial statement there was a complete FBI investigation of the incident in the midst of the trial. This the court concluded, interfered with the juror and impeded the jury thus jeopardizing the integrity of the entire jury deliberation. It does not appear that any limiting instruction was given and the case was remanded for a hearing to determine the circumstances and impact of this event on the jury.

In United States v. Brasco, 385 F.Supp. 966 (S.D. N. Y. 1974), aff'd., 516 F.2d 816 (1975), decided some one-and-one-half years after King's trial, the trial court held a hearing based on the directive of United States v. Rattenni, 480 F.2d 195 (2d Cir. 1973), also decided subsequent to King's conviction. Brasco, of course, involved numerous instances of particularly egregious jury misconduct and, in addition to the eight instances mentioned in footnote 2 at 385 F.Supp. 969, the court specifically focused on the alleged reading of a newspaper article concerning the trial in progress. Brasco on its facts is distinguishable from the instant petition since the motion for a new trial was made shortly after the original trial. In this case, King raises some four years after trial, a highly

suspect, vague, weakly supported allegation that a trial juror was exposed to prejudicial publicity and asks for the same relief as if this allegation were raised during trial. Indeed the rule announced in Remmer v. United States is not questioned but it is respectfully submitted that King has not made a sufficient showing of prejudicial newspaper articles being read or for that matter newspaper articles being read by the sequestered trial jury to allow this Court to order a hearing.

In Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171 (1959), extremely prejudicial newspaper articles concerning the defendant were read by a substantial number of jurors. The Supreme Court held that a new trial was necessary. But, Marshall was a case where the articles were extremely prejudicial and, in addition, were seen or read by seven trial jurors. That case cannot be compared to the instant case where an allegation is being made by a vague check marked (✓) form that one trial juror had allegedly seen newspaper accounts of the trial. Marshall, of course, involved a situation that was raised during trial, completely unlike the situation in the instant petition where the allegation is raised some four years after verdict.

This Circuit, in United States v. Brasco, 516 F.2d 816 (2d Cir. 1975), asserts the two rules concerning private communications to a jury -- one rule requiring a showing of prejudice to the defendant and the other rule raising a

presumption of prejudice. It is respectfully contended that the purported statement of Mrs. Helen Postal does not fall within either of these rules. The purported statement of the juror, Mrs. Postal, does not state affirmatively or otherwise that she read news articles concerning the case on trial -- it merely shows a check-marked space which could easily have been mischecked. The affidavit of Michelle Malina does not state that Mrs. Postal stated these facts to her.

The Malina affidavit is incompetent hearsay and is completely conclusory on the crucial point of whether Mrs. Postal stated that she read newspaper accounts of the trial and whether Mrs. Postal stated that she saw television coverage of the trial. The record in this case and the instant motion make clear that any juror would say he or she was "aware of why the defendant was in the hospital." The Court specifically told them that King had been injured over the weekend. The obvious ambiguity in the date the trial resumed, the failure to state the alleged circumstances under which the statement of Mrs. Postal was obtained, and the date of this affidavit -- some three years after the trial -- should persuade this court to uphold the trial judge's determination about the Malina affidavit.

In United States v. Rattenni, 480 F.2d 195 (2d Cir. 1973), the facts were similar to Marshall v. United States, since six jurors heard a radio broadcast during the trial and one juror also read a newspaper article that, she confessed, prejudiced

her against the defendant. In Rattenni the trial juror readily and clearly admitted prejudice and this court concluded, because of this, that the entire verdict was tainted. The holding that the verdict must be set aside where "even one juror in effect admits prejudice . . . ", 480 F.2d at 198, is based obviously on the facts in Rattenni, that the juror "readily admitted her prejudice against Rattenni on the remaining charges." 480 F.2d at 196.

The alleged juror statement in the instant petition does not, in any way, rise to the level of the expression of juror prejudice found in Rattenni. There is obviously no expression of prejudice from the alleged juror statement and the Government contends, because of the patent defects in the statement itself, (incompetent hearsay, conclusory, misleading, without explanation of how it was obtained), that the statement does not fall within the rule mandating a finding of presumptive prejudice.

Here, of course, the allegation of a private communication to a juror does not come during trial, or days or weeks after trial, but comes suspiciously, some four years after verdict. This point also overlooks the most critical distinction; this was the direct foreseeable consequence of King's own deliberate conduct and not some outside force over which he had no control.

This court's recent discussion of the issue of prejudicial newspaper articles and the refusal of the trial judge to voir dire the jury on their possible exposure to those articles does

not bear directly on the facts of this case. United States of America v. James R. Lord, Jr., Yagy & Schwartz, ____ F.2d ____, (decided Nov. 15, 1977, Docket No. 77-1157).

In Lord, supra, the jury was not sequestered, the entire panel of prospective jurors was exposed to the prejudicial remark from the very beginning of the trial process, two veniremen had specific recollections of prejudicial information, and the two veniremen repeated and disseminated the prejudicial information to the rest of the jury panel. The facts in Lord are completely different than those in the instant case and we submit that Judge MacMahon was completely correct in his refusal to voir dire the sequestered jury based on the precautions taken from the very beginning of the trial.

King states that Judge MacMahon's failure to voir dire the sequestered jury on the issue of their possible exposure to publicity was error. This argument was raised previously in direct appeal (App. 184-190) to this Court, and was rejected (App. 226). Nevertheless Judge MacMahon analyzes and responds to King's contention by referring to People v. Manson, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (2d Civ. 1976), cert. denied sub nom. California v. Manson, 45 U.S.L.W. 3707 (U.S. Apr. 26, 1977), a case that dealt with the same issue that King attempts to raise once again.

Manson, supra, provides a particularly appropriate answer to King's complaint of error and contains language especially

relevant to the facts in this case. In upholding the judge's refusal to voir dire the jury during trial the Appellate Court said

The trial court properly denied applications of appellants' counsel to voir dire the jury to determine if it had been exposed to this publicity. The application was not supported by any showing that the court's security or jury maintenance order had been violated.

* * *

The trial court informed counsel that it was monitoring the sequestration and was satisfied that the jurors were not subjected to news about the case. Under the circumstances the court's decision was correct. The whole purpose of the elaborate sequestration would have been frustrated if the court had been required to voir dire the jury to ask if they had knowledge of the very information that was to be kept from them. In the absence of hard evidence that jurors were subjected to news stories or any other information that might have been prejudicial, there was no sense in allowing a court to be drawn into a "Catch 22". 132 Cal. Rptr. at 318-19 (emphasis added) (footnote omitted).

The Manson opinion further held that the hearsay and double hearsay allegations of prejudicial information reaching the sequestered jury were insufficient to cause any post-verdict voir dire of the jury.

Here, Judge MacMahon was faced with a weaker showing than in Manson and was therefore completely correct in denying King's petition in its entirety. As Judge MacMahon states

There was not then, nor is there now, any "hard evidence" that the jury was in fact aware of King's extra-curricular activities (MacMahon opinion -- App. 180).

POINT IV -- THE ALLEGED JUROR STATEMENT IS CONFUSED, AMBIGUOUS, INCOMPETENT HEARSAY AND IS "DEFICIENT ON ITS FACE"

King contends that the purported statement of juror Helen Postal compels a hearing at which both she and the other trial jurors may properly testify. We submit that due regard to the nature of the statement as well as its substance mandates the opposite conclusion.

In the first place, we have here not an affidavit from a juror, as in the case of United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970), but simply a purported statement. Moreover, whereas in McMann affidavits from the jurors were obtained promptly after the verdict was rendered, here there was a disturbing lapse of some 2-1/2 years. Thus, in addition to lacking the trustworthiness of an affidavit, the proffered statement of Mrs. Postal presents information that is stale and susceptible to inaccuracy. At this date, it taxes the imagination to believe that the jurors have not by this time fully learned of the weekend incidents of violence. It is not improbable that at least a few of the jurors, perhaps including Mrs. Postal, would now be unable to place into proper perspective events that closely followed the trial. In short, after 2-1/2 years, Mrs. Postal's susceptibility to confusion or suggestion is too great to justify confidence in her purported statement.

The value of the statement is also called into question by its form. The paper is merely a checklist lacking any detail

and offering equivocal information. And as will be discussed shortly, there is no implication that the information to which Mrs. Postal was allegedly exposed, whether benign or not, was ever communicated by her to other jurors. In addition, inspection of the purported statement reveals inaccuracies which test its credibility. First, the trial is said to have resumed and the court convened in St. Luke's Hospital on Tuesday, February 27, 1973. This is plainly incorrect as the record indisputably shows that the trial resumed on Monday, February 26, 1973. Second, Mrs. Postal, an Oneida County resident, on two occasions misspells the word "Oneida" and incorrectly writes "Onieda" as her city of residence before striking it out. Third, though crossed out, the name "Mrs. Helen Postal" was clearly signed in the jurat section indicating confusion, and serving to underscore our doubts about the alleged statement.

Similarly flawed is the affidavit of Michelle Malina, witness to the signing of the purported statement, executed almost 8 months later on June 24, 1976. Once again the trial is said to have resumed on February 27, 1973. But much more compelling is the fact that though Malina swears that she re-signed the Postal statement on June 24, 1976, the two signatures are not even remotely similar.

On the basis of the foregoing we submit that the purported statement of Mrs. Postal is not sufficiently trustworthy to serve as a basis for holding a hearing at which she would

testify. To allow the testimony of a juror on the recommendation of such specious documents would be a subversion of public interest, central to the jury incompetency rule, in securing the integrity and finality of jury verdicts. See Fed. R. Evid. 606(b) and Advisory Committee Comments; McDonald v. Pless, 238 U.S. 264, 267 (1914); Government of the Virgin Islands v. Gereau, 523 F.2d 141, 148-149 (3d Cir. 1975), cert. denied 424 U.S. 917 (1976).

It is no less plain that the other jurors in this case are also incompetent to testify. With the exception of the conclusory hearsay statements of Mr. Wakeel to which we shall soon address ourselves, King has offered absolutely nothing to show that any of the jurors other than Mrs. Postal was exposed to extraneous information possibly prejudicial to King, either within or outside the courtroom. The purported statement of Mrs. Postal does not directly state, or in any way intimate, that the other jurors were exposed to extraneous information either through conversations with Mrs. Postal or independent of her. Whatever "hint" to the contrary might conceivably be found could not in itself constitute good cause to hold a hearing. See United States v. Mitchell, 389 F.Supp. 917, 918-919 (D.C. Dist. Columbia 1975).

This is not a case where it is alleged that extraneous information actually infiltrated into the jury room, see Mattox v. United States, 146 U.S. 140 (1892). (Newspaper editorials prejudicial to the defendant read to the jury in the jury room.) There being absolutely no indication of such contamination here,

it would fly in the face of the rule of juror incompetency to permit these jurors to testify. The assurances which the rule seeks to provide against jury harassment and the stability and finality it seeks to import to verdicts would be undermined if verdicts were to be subject to attack, and jurors called to testify on such baseless grounds.

After having been sequestered for two weeks and having deliberated this case carefully, the jury may fairly be said to have performed its civic duty. In addition, as the record shows, attempts to reach the jury were considered before trial (Trial Tr. at 1048, 1082, 1086). To hold a hearing now on the basis of petitioner's patently insufficient showing would only serve to expose the jurors to further anxiety and, conceivably, additional threats. Moreover, almost five years have passed since the trial, and unquestionably the jurors recollections will be hazy and susceptible to manipulation.

We submit that King has not made a sufficient showing to necessitate a hearing, that the jurors may not properly be summoned to testify, and that the decision of the trial judge denying King's motion on the basis of the files and records was correct.

King's reliance on United States v. Eagle, 539 F.2d 1166 (8th Cir. 1976), is misplaced and does not support King's request for an evidentiary hearing. Eagle involved a hearsay assertion that one juror knew prejudicial information about the

defendant and that therefore extraneous prejudicial information was present in that juror's mind. There was no contention that the juror voiced the prejudicial information he allegedly possessed to any other juror and the Government submitted the affidavit of juror Long in which the juror denied "knowing" any prejudicial information. The juror admitted "speculating" about defendant's involvement in an unrelated offense but denied discussing his speculations and denied that the speculations affected his decision against the defendant. 539 F.2d at 1169.

Based on these facts, that the juror's speculations stayed in his own mind and did not affect his decision, the court in Eagle ruled that the defendant had no right to subpoena any of the remaining jurors. Eagle is authority for denying a hearing where the allegations are insufficient to impeach a verdict and where incompetent hearsay allegations are alleged.

In United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970) the Court remanded the Section 2255 application for a hearing based on the factors that members of the trial jury recalled newspaper stories concerning defendant's jailbreak and, most significantly, that the members of the jury had discussed the escape and the subsequent apprehension of defendant while in the jury room. The escape which was discussed in the jury room was, of course, an escape from jail while under indictment awaiting trial for the same charge that was brought to trial. While no affidavit of any juror was submitted in support of the post-trial relief, counsel filed papers asserting the two

critical facts that the jurors (no number mentioned) knew of the jailbreak through newspaper accounts and discussed it during jury deliberations. It does not appear that the jury in McKinney was sequestered.

In United States ex rel Owen v. McMann, 435 F.2d 813, this court made a similar ruling based upon similar, but stronger, facts of extraneous prejudicial information infiltrating the jury room. The decision in Owen v. McMann was based upon the affidavits of two jurors and a hearing held by the District Judge. The affidavits and the hearing revealed that the jurors knew a great many prejudicial, extra-judicial facts about the defendant and most significantly that they discussed these matters during jury deliberations. This Court held that, based on the nature of the prejudicial extra-record matters that "infiltrated" the jury room, the probability of prejudice was obvious.

King's application does not fall within McKinney or McMann because of a number of important differences. Firstly, there is no affidavit of a juror -- but rather a confused, highly suspicious, ambivalent questionnaire-type "statement".

Secondly, the purported juror statement is simply a prepared questionnaire and contains very little, if any, of the juror's own statements. The questionnaire merely contains easily misplaced check marks (✓) that indicate suspiciously and haphazardly that Mrs. Postal "read articles" concerning the case.

Third, the purported juror statement is so completely prepared that it contains only three words in the juror's own handwriting. It lacks essential detail as to every aspect of the circumstances surrounding the signing of the "statement".

Fourth, the purported statement of a juror does not state that anything that may have been learned was discussed with other jurors. The critical factor in both McKinney and McMann was that the trial jury discussed the prejudicial information during deliberations. That factor is missing here.

Fifth, the purported statement of the juror comes long after the verdict, some two and one-half years, whereas in McKinney the motion was filed immediately after conviction, i.e., three days after conviction. In McMann precisely the same thing happened -- counsel obtained affidavits from the jurors very shortly after verdict and presented them on sentencing.

Sixth, the purported statement contains a clearly erroneous statement in stating that the trial resumed on Tuesday, February 27, 1973. The record is indisputable that the trial resumed on Monday, February 26, 1973.

Seventh, the purported statement nowhere refers to defendant "King" explicitly and contains obvious misspellings in the handwritten words "Onieda" (sic) -- a word too common to be misspelled by an Oneida County resident.

Eighth, the purported statement is vague and ambivalent when it refers to alternative fact situations and uses phraseology like "I did make or I did receive one or more telephone calls" and "As best as I can remember". The statement about knowing why defendant was in St. Luke's Hospital is completely logical and adds nothing.

King's papers do not fit the guidelines of either McKinney or McMann since, as stated above, the purported statement of the juror contains obvious error and patent deficiencies. The facts in McKinney demonstrate two crucial elements of jury infiltration that are absent from King's papers; namely, prejudicial knowledge and use of the prejudicial knowledge during deliberation. In view of these patent deficiencies, Judge MacMahon was completely correct in dismissing King's petition without any hearing.

POINT V -- THE ALLEGED ORAL STATEMENTS OF A MOTEL MANAGER
ARE INSIGNIFICANT, ARE INCOMPETENT HEARSAY,
AND AMOUNT TO PURE SPECULATION

King claims that the hearsay statements of Mr. Wakeel, as related to King's counsel, together with the purported juror statement, constitutes a sufficient showing to mandate an evidentiary hearing under 28 U.S.C., Section 2255. The Government contests this on the following grounds.

It is true that where a motion for relief under 28 U.S.C., Section 2255 is sufficiently supported, summary rejection is improper. Taylor v. United States, 487 F.2d 307 (2d Cir. 1973). It is no less certain, however, that the decision of a District Judge to deny an insufficient motion without a hearing is a matter properly within his discretion. Machibroda v. United States, 368 U.S. 487, 495 (1962); Accardi v. United States, 379 F.2d 312 (2d Cir. 1967); Mirra v. United States, 379 F.2d 782 (2d Cir. 1967). This is just such a case. Here, King's motion is recommended by a recitation of the hearsay conclusions of Mr. Wakeel and the unsworn purported statement of a juror and affidavit of an alleged witness to the "statement". In Simmons v. United States, 354 F.Supp. 1383, 1386 (N.D. N. Y. 1973) (MacMahon, J.), the court rejected similar assertions as insufficient, and in affirming this court announced that

Mere generalities or hearsay statements will not normally entitle the applicant to a hearing, since such hearsay would be inadmissible at the

hearing itself. (citations omitted). The petitioner must set forth specific facts which he is in a position to establish by competent evidence. Machibroda v. United States, 368 U.S. 487, 495-496 (1962).

Dalli v. United States, 491 F.2d 758, 760-761 (2d Cir. 1974).

The unreceptiveness to hearsay assertions in support of Section 2255 motions is apparent in several decisions. See e.g., United States v. Pisciotta, 199 F.2d 603, 607 (2d Cir. 1952); United States v. Catalano, 281 F.2d 184 (2d Cir.), cert. denied, 364 U.S. 845 (1960); D'Ercole v. United States, 361 F.2d 211 (2d Cir.) cert. denied, 385 U.S. 995 (1966).

In D'Ercole, supra, the petitioner offered an affidavit of a prisoner relating a conversation the prisoner allegedly had in prison with petitioner's co-defendant at trial, in which the latter purportedly admitted that he had been coerced by federal agents to implicate the petitioner and testify against him at trial. This court acknowledged that the declarations, if true, would entitle the petitioner to relief under Section 2255 for the denial of his Fifth Amendment right to due process, yet the Court affirmed the District Court's denial of the application without a hearing. This court stated:

The difficulty is that the affiant's statement of what /the co-defendant/ said does not qualify as proper evidential material to support a petition under §2255 because it is hearsay and could not be used at a hearing. (361 F.2d at 212).

There is nothing here which imparts particular reliability to the hearsay statements of Mr. Wakeel or the purported statement

of the trial juror, or which in any other manner excepts it from the reasoning of the cases cited. Indeed, the circumstances which the memory of Mr. Wakeel allegedly reconstructs are over three-and-one-half years old. As King has not shown that he has "actual proof of the allegations going beyond mere unsupported assertions," Barry v. United States, 528 F.2d 1094, 1101 (7th Cir. 1976), the Government respectfully submits that Judge MacMahon was completely correct in denying a hearing and depositions.

"Section 2255 does not grant an absolute right to an evidentiary hearing." Patrick v. United States, 310 F.Supp. 1267, 1269 (E.D. Mo. 1970), nor does the "language of the statute strip the district courts of all discretion to exercise their common sense." Machibroda v. United States, 368 U.S. 487, 495 (1962). Here, the "evidence proffered by King is wholly speculative and conclusory, and would not entitle him to relief even if proven. Judge MacMahon's decision that King's application should be denied without a hearing should stand. Burris v. United States, 430 F.2d 399, 402 (7th Cir. 1970); Cardarella v. United States, 375 F.2d 222, 230 (8th Cir. 1967); Tropiano v. United States, 323 F.Supp. 964 (D. Conn. 1971).

Title 28, U.S.C. Section 2255 specifically provides that the motion may be denied without a hearing if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief. See Fontaine v. United States, 411 U.S. 213, 215 (1973). In the instant case, the trial court immediately

ascertained at trial that the jury did not hear of the incident around which King's claim centers. (Trial Tr. p. 661), and was assured by the United States Marshal that nothing improper had transpired. What is more, the Court sternly admonished the jury on nine different occasions not to talk with others about the case or to allow themselves to be exposed to any media coverage of any kind concerning the case. (Tr. 207-208, 477, 595, 654, 742, 814, 859, 961, 1025). And the jury was, of course, sequestered in the first place to avoid this very problem (Tr. p. 12).

It would be irresponsible to assume that the jury did not heed the judge's admonitions, United States v. Marshall, 458 F.2d 446, 452 (2d Cir. 1972), particularly on the basis of unreliable hearsay speculation. Rather, when a trial judge assures himself that charges of deliberate disregard of their sequestration and the court's admonitions by the jury are improbable or unlikely, at the least, this conclusion from his knowledge of the trial and the conduct of the jury therein is entitled to respect. Burris v. United States, 430 F.2d 399 (7th Cir. 1970), cert. denied, 401 U.S. 921 (1971). Indeed, it has been acknowledged that the purpose of presenting a motion pursuant to Section 2255 to the trial judge is so that he can make use of his personal knowledge of trial occurrences in passing on claims for relief based on such occurrences. Mirra v. United States, 379 F.2d 782, 788 (2d Cir. 1967)

(citing United States v. Smith, 379 F.2d 49, 53 (4th Cir. 1964), cert. denied, 381 U.S. 915 (1965); Panico v. United States, 412 F.2d 1151, 1155-1156 (2d Cir. 1969).)

Our conclusion that the trial judge correctly determined that the perceptions of the jury were not sullied by improper information is bolstered by the manner in which they deliberated their verdict. After receiving the case before noon on Wednesday, February 28, 1973, (Tr. 1003) they deliberated until 10:30 p.m. that evening (Tr. 1026) and continued the following morning until their verdict was delivered at 12:15 p.m. on Thursday, March 1, 1973. Not only was the jury's consideration of the case extensive, but they exhibited great care in their analysis, requesting tapes to be reheard as well as the Court's charge on Count I. In the face of evidence pointing so forcefully to the guilt of King (Tr. 1083), such care in deliberation irresistably suggests that the jury proceeded cautiously and properly and was in fact ignorant of what had transpired over the weekend. It is clear, then, that a review of this motion, and the files and records of this case, conclusively demonstrates that the jury was not prejudiced by improper information. King, therefore, is entitled to no relief, and Judge MacMahon's decision denying his request for a hearing or, alternatively, for an order directing Mr. Wakeel to submit to a deposition, should be upheld.

The Government also contends that these issues have already

been exhaustively litigated and the present appeal raises no new evidence of material significance.

At trial, on motion of defense counsel, the court heard arguments and determined that no voir dire or evidentiary hearing was necessary in view of its knowledge of the facts and the posture of the trial. On appeal, United States v. King, 486 F.2d 1397 (2d Cir. 1973), the same counsel pursued the same questions regarding a possible mistrial and the necessity for a voir dire hearing -- and was again unsuccessful. Ultimately, the United States Supreme Court denied certiorari. 416 U.S. 958 (1974). Finally, and most significantly, during September of 1975, the trial court rejected an application for relief under Section 2255 premised on an affirmation of defense attorneys comprised of the hearsay statements of Mr. Wakeel. Judge Mac Mahon held in September of 1975, that speculation and conclusory declarations such as Mr. Wakeel's were insufficient to require a hearing, and that even assuming their evidentiary competence, the contentions they allegedly supported were defeated repeatedly in prior litigation and could not be raised again.

The recollections of Mr. Wakeel represent nothing that is significantly new or material; they are merely "cumulative" and patently inadequate to upset King's conviction. Panico v. United States, 412 F.2d 1151, 1155 (2d Cir. 1969); Tropiano v. United States, 323 F.Supp. 964, 966 (D. Conn. 1971). The arguments that the jury might have learned of the hand grenade

incident were raised at trial, but the judge admonished the jury and satisfied himself that they in fact remained unaware of the incident. Again on appeal arguments were heartily urged and were again denied. Mr. Wakeel's statements do not intimate that the jurors actually saw or heard any media account of the incident, or any conversation relating to it, or in any other way provide any new critical evidence of jury prejudice. In short, unless a motion under Section 2255 is to serve as a vehicle for the relitigation of issues previously settled, the hearing and deposition requested should be denied. Dalli, supra, at 761; Panico, supra; Williams v. United States, 334 F.Supp. 669 (S.D. N. Y. 1971), aff'd., 463 F.2d 1183 (2d Cir. 1972), cert. denied, 409 U.S. 967 (1972). In addition, as the declarations of Mr. Wakeel proffered here differ in no material respect from those considered on the previous Section 2255 motion, this matter has itself been effectively litigated. See Ormento v. United States, 328 F.Supp. 246, 259 (S.D. N. Y. 1971).

During the trial, the trial judge held a hearing to determine the voluntariness of King's criminal conduct and found it to be voluntary. (Tr. 1069, 1074-1087). That King subsequently entered a guilty plea to the possession of an unregistered hand grenade in violation of Title 26, U.S.C. Sections 5861(d) and 5871, one of the charges issuing from the weekend incident, only serves to underscore the correctness of the court's ruling. To allow him now to realize a new hearing as the fruit of his act

of deliberate, criminal violence would be an affront to a basic sense of justice. "The language of the statute does not strip the district courts of all discretion to exercise their common sense." United States v. Franzese, 525 F.2d 27, 32 (2d Cir. 1975), quoting, Machibroda, supra, at 495. Judge MacMahon's decision (App. 190) rejecting the alleged declarations of the motel manager was correct and should be upheld.

POINT VI -- KING MUST BEAR THE DIRECT CONSEQUENCES OF HIS
VOLUNTARY WILLFUL CRIMINAL ACT.

King claims that the voluntary act rationale used by Judge MacMahon (App. 182-189) is incorrect since the cases cited involve unruly conduct in the courtroom or voluntary absence from the trial. King claims, in an argument which is illogical and tortured that his absence was not voluntary.

The Government submits that King's argument is specious. King's analogy to driving a car and becoming incapacitated because of an auto accident (Brief 43) completely misses the mark. The entire thrust of Judge MacMahon's analysis is that King must bear responsibility for his voluntary act of attempting to cause a mistrial. King's deliberate attempt to interfere with the administration of justice was a voluntary deliberate criminal act which caused him to be shot. The record is crystal clear that King voluntarily and willfully threw the grenade into Agent Kelly's home. We submit that even the tortured analysis used by King cannot convert the hand grenade toss into an "incident" (App. 46) or an "incapacitating accident" (Brief 43).

The Government submits that Judge MacMahon's analysis is accurate and is entirely consonant with the law in this Circuit. United States v. Bentvena, 319 F.2d 916, 931 (2d Cir.), cert. denied, 375 U.S. 940 (1963); United States v. Tortora, 464 F.2d

1202 (2d Cir.); United States v. Pastor, 557 F.2d 930, and the law of this land. Illinois v. Allen, 397 U.S. 345, 350-51.

In Tortora, supra, this Circuit established the factors a trial judge must weigh in deciding whether to proceed in the absence of a defendant.

Before a trial may proceed in the defendant's absence, the judge must find that the defendant has had adequate notice of the charges and proceedings against him

He must weigh the likelihood that the trial could soon take place with the defendant present; the difficulty of rescheduling, particularly in multiple-defendant trials; the burden on the Government in having to undertake two trials, again particularly in multiple defendant trials where the evidence against the defendants is often overlapping and more than one trial might keep the Government's witnesses in substantial jeopardy. 464 F.2d 1202 at 1209, 1210.

Here precisely all these factors were taken into account by Judge MacMahon and were satisfied. King's trial was a multiple defendant case, the main witness had already been threatened, the evidence overlapped, and King was completely aware of the proceedings, having attended four days of trial.

As recently as May of 1977, this court discussed the issue of a defendant's voluntary absence from his trial and said

The decision as to whether the defendant's voluntary absence from the trial amounts to a waiver is thus vested in the sound discretion of the trial judge, who is usually in a superior position to evaluate the evidence, including witnesses' credibility, because of familiarity with the background and circumstances. Moreover, where an evidentiary hearing is

conducted to examine these circumstances, the trial judge's findings which form the basis of his or her decision on the issue will not be disturbed unless found to be clearly erroneous. (citations omitted) (emphasis supplied) United States v. Pastor, 557 F.2d 930, 934.

Here, as is plain from the record, the trial judge held an evidentiary hearing and made findings (Trial Tr. 1073). Moreover, King's later plea of guilty to the hand grenade charge shows that the findings of the trial judge are completely accurate.

King begins his attack on the "voluntary act rationale" by assuming, without any support in the record, that prejudicial publicity reached the jury and that excessive force was used. (Brief 42, 43). King has failed to surmount the hurdle of proof to show a basis for either of these assumptions. Judge MacMahon, of course, finds King's evidence totally insufficient but discusses the applicable law to show that King could not succeed in his arguments even if he possibly could show that prejudicial publicity reached the jury.

We submit that Judge MacMahon's analysis is completely accurate, is certainly not "clearly erroneous", and should be upheld, once again, by this Court.

POINT VI' - THERE IS NO SHOWING THAT EXCESSIVE PHYSICAL
FORCE WAS USED AGAINST KING WHICH CAUSED
HIM TO MISS ANY SIGNIFICANT PORTION OF HIS
TRIAL

King argues that the excessive force used by police officials seriously injured him and caused him to be unable to attend his trial. King says his gunshot wounds resulted from a "clearly planned ambush" and the injuries were a "supervening intervening cause" of his absence. King does not, and cannot, find support for these allegations in the record but instead points to the King affidavit of November 30, 1976 as factual support for these charges. Clearly, King's affidavit does not support the allegations he makes.

The King affidavit (App. 89) is curiously silent about the "ambush" and is mysteriously quiet on the events prior to his "arrival" at the parking lot of the Ramada Inn. King himself never once mentions an "ambush", never discusses the events at Agent Kelly's house, never denies he exchanged shots with law enforcement officials, never denies possession of the hand-grenade and never contradicts the trial record.

King cites no case authority for the proposition he puts forth at page 45 of his Brief. Our research has not discovered any controlling federal statute or case law that would support the specific contentions petitioner makes. The entire argument set forth pivots on the contentions set forth in the King affidavit, especially paragraphs six through ten.

King, a twice-convicted felon, who has admitted throwing a hand-grenade into the home of an FBI Agent and has been convicted of a crime involving the use of violence, asks the trial court to accept an affidavit he makes some three-and-one-half years after certain events. On close reading, the King affidavit is most noteworthy for what it fails to mention rather than what it contains. King, for example, simply mentions in paragraph 6 of his affidavit that

"the events of that night brought me to the parking lot of the Ramada Inn".

How casually King treats the events of that night; King completely fails to mention "the events" namely, his smashing of a window, throwing a hand-grenade, and engaging in shootouts with police officials at the home of the FBI Agent and at the Ramada Inn. King completely fails to mention, quite thoughtfully, what magical propelling force "brought him" to the Ramada Inn, the very motel where the jury was being sequestered.

King asserts in paragraph eight of his affidavit that a "shiny chrome revolver" was planted next to his body and that after being shot, a "dummy grenade" was also planted alongside his body. Viewing these allegations in light of the prior proceedings in this Court, shows them to be entirely baseless. King was indicted for possession of two unregistered hand-grenades and other charges and has pleaded guilty to possession of one of these. His claim now that the second hand-grenade

was not in his possession and was a "dummy grenade" was properly rejected by the trial court. The allegations concerning the "dummy grenade" come in affidavit form some four years after this event and are totally contradicted by the files, records, transcripts, and prior proceedings in this Court. King's story about police officials planting a gun alongside his body, shooting him three times, and then dragging him "because he may have another gun under him" is not only incredible but is totally illogical. If, as King contends, the "FIRST VOICE" and "SECOND VOICE" knew he was not armed, why would they be concerned after shooting him that he might have another gun. The truth is that King was in possession of both the gun and the second hand-grenade.

It has been the Government's contention, which was stated at sentencing on the hand-grenade charge, that the grenade was capable of exploding but simply malfunctioned. King, of course, claims that the grenade was a "dud". It is respectfully contended that the King affidavit should be afforded very little, if any, weight in this proceeding because the facts, as already established by the files, records, and prior proceedings completely invalidate the King affidavit. King's self-serving memory is not only selective but is extremely suspect concerning the events of the evening of February 24, 1973. King's motive and bias in this proceeding are obvious.

In King's motion to Judge MacMahon he admits that "if his

own willful actions prevented his attendance [at his trial], then he waived that right". (App. 75). That statement does not seem to appear in King's brief before this court, yet it states one of the crucial issues in this litigation. The Government contends that King's actions were deliberate and willful and that his own willful acts caused his injuries and absence from his trial.

The Basic Issue Has Been Litigated and King Has Waived His Right to Further Litigation

The trial court has already litigated the question of King's attendance at his trial and gave King every opportunity to litigate whether it was his willful act. The trial court's ruling that it was King's willful act, (App. 121, 122) has been affirmed all the way up to this nation's highest court. It is outrageous to suggest that four years later, on the basis of this flimsy application, this court should relitigate this whole issue.

King has had many opportunities to raise his allegation that he was "shot unlawfully" but has successively waived these opportunities. King could have raised this several times at trial but chose not to. King raised the issue of his being shot in his direct appeal to this court (App. 194), but was not successful. In short, this issue has already been litigated.

Petitioner's Contention That He Could Not Attend His Trial is Meritless

The logic of petitioner's argument fails completely. The bridge he attempts to build between the use of physical force and his absence from the trial cannot withstand the weight of logic.

Let us assume for a moment that the King affidavit is partially accurate and that excessive force was used at the Ramada Inn (circumstances the Government emphatically disputes). Even under these facts, King is not entitled to any relief since the events at the Ramada Inn were not the sole cause of his hospitalization. The King affidavit claims that he was shot three times while at the Ramada Inn and had been shot 14 times earlier. His affidavit claims, in paragraphs seven and nine, that he was already paralyzed by the earlier gun shot wounds. The only logical conclusion that can be drawn is that the 14 wounds inflicted during his earlier crime would have, of themselves, caused his extensive hospitalization regardless of any later injury at the Ramada Inn. Since King's earlier injuries resulted from his own deliberate criminal acts for which he is chargeable, his tenuous reasoning fails.

King carefully avoids reference to what was proved at the post-trial hearing. That hearing shows that he was shot while committing a heinous felony -- that is, while attempting an assault on an FBI Agent, or an arson of the agent's home, or

while escaping from those felonies. Counsel's argument and answer to this is that law enforcement people were "lying in wait for petitioner at Agent Kelly's home". We submit that remark is entitled to the same weight as if King were committing an armed bank robbery and a bank guard "lying in wait" shot him during the robbery.

Beyond all the tortured logic put forth by King is the clear, inescapable fact that King missed very little of the actual trial. The claimed "loss of confrontation" is actually non-existent. The record clearly shows the only portion of the trial that petitioner missed was the playing of two tape recordings. King had, in fact, already heard these same tapes during pre-trial discovery proceedings. The record is clear that King did not miss any testimony against him from any government witness. King, in effect, missed no part of the Government's case but gained, and was afforded, the opportunity to testify in his own behalf from a hospital bed under circumstances sympathetic to him. In examining the record carefully, it is amazing to find that King, in reality, missed no part of the Government's case. The only occurrence during King's absence from the trial was the playing of two tape recordings which he had already heard. King was, of course, intimately familiar with these tapes since they concerned conversations in which he was a direct participant (Trial Tr. 665-685).

King's claim of absence from his trial is totally without merit.

POINT VIII -- THE TRIAL COURT CORRECTLY RULED
THAT DEPOSITIONS WERE UNNECESSARY

Appellant King cites Harris v. Nelson, 394 U.S. 286 (1969) for the proposition that he should be given full latitude to pursue discovery, in depth, of a multitude of witnesses, most of whom have very little connection with the issues in his petition. King says Harris allows this discovery as a necessary adjunct to a habeas corpus application. The Government respectfully disagrees.

Speaking for a divided court, Justice Fortas states, at the very outset of his opinion, the following:

we conclude that, in the appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories
... (emphasis supplied) 394 U.S. at 290.

Harris was a case where the district court granted an evidentiary hearing and the issue was how the petitioner was to proceed to discover additional facts in support of his claim. In Harris the petitioner had obviously made a prima facie case for relief and the issue was implementation of his already sufficient petition. Harris dealt with the issue of the type of relief a district court could fashion in an attempt to assist a petitioner with discovering facts for purposes of the hearing.

This is not to say that there is no way in which a district court may, in an appropriate case, arrange for procedures which will allow development, for purposes of the hearing, of the facts relevant to disposition of a habeas corpus petition. (emphasis supplied) 394 U.S. at 298.

At any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held . . . (emphasis supplied) 394 U.S. at 300.

Whereas Harris dealt with a petitioner that had made a prima facie showing, that threshold has not been surmounted by King's papers.

We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. Harris v. Nelson, 394 U.S. 286, 300; 89 S.Ct. 1082, 1091; 22 L.Ed. 2d 291 (1969). Accord, Barry v. United States, 528 F.2d 1094 (7th Cir. 1976); Loper v. Beto, 440 F.2d 934 (5th Cir. 1971). Cf. Cameron v. Fastoff, 543 F.2d 971 (2d Cir. 1976).

We do not overlook, of course, the discretion given to the district court concerning the nature and extent of permissible discovery.

The Government respectfully contends that the specific allegations before the trial court were highly suspect, extremely weak and stale, and could not reasonably be believed. The Government contends that based on an examination of the records and files of the case as compared to the insufficiency of the petition, the trial judge correctly dismissed King's petition in its entirety. The prepared questionnaire-form type of statement is totally lacking in credibility since its whole thrust revolves around two check marks. Based on this totally

deficient "statement" of a juror, petitioner is entitled to no relief by this Court. Cf. Willis v. Ciccone, 506 F.2d 1011 (8th Cir. 1974).

It is interesting to note that King, four years after verdict, requests depositions and a broad range of post trial inquisition of the type that was expressly condemned in Harris. King, for example, requests depositions of "/s/tation managers or other record custodians of local television and radio stations", (App. 22) and every agent of the United States Government who supervised or communicated with the trial jurors subsequent to the "shoot out", and the Honorable Lloyd F. MacMahon, the trial judge. King wishes the type of discovery appropriate to ordinary civil litigation, and the Supreme Court in Harris decided that such discovery is not contemplated by the situation in a petition under 28 U.S.C. 2255. Argo v. United States, 473 F.2d 1315 (9th Cir. 1973), supports the Government's contention that discovery procedures may be employed in the course of a Section 2255 hearing at the sound discretion of the trial judge.

Wagner v. United States, 418 F.2d 618, (9th Cir. 1969) and the later Ninth Circuit case of Wallace v. United States, 457 F.2d 547 (1972) reject bald assertions that there was error in a trial but require sufficient detail in the allegations. Although the cases hold that "minute" detail is not required, they do require "sufficient" detail.

The Government respectfully contends that the petition in the instant application is insufficient for the reasons stated heretofore and that there should be no further discovery than was carried out by King.

In view of the spurious, speculative, and hearsay nature of the allegations set forth in King's petition, the trial judge properly ruled that discovery was completely unnecessary.

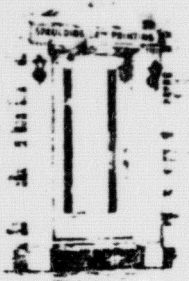
CONCLUSION

The Government respectfully submits that the trial judge was correct in denying King's motion without further hearing. The matter complained of is the product of King's own deliberate criminal conduct and to allow him to set aside his conviction as a result of his deliberate criminal conduct would be a perversion of justice. King's papers are totally insufficient to require any further action since they contain no showing by competent nonhearsay evidence of anything new. The theories advanced by King and the grounds for these theories fail because they have already been litigated, have been waived, or simply lack substance. The trial judge was completely correct in ruling that the files and records of this case conclusively show that King is entitled to no relief.

Respectfully submitted,

PAUL V. FRENCH
United States Attorney for the
Northern District of New York
3rd Floor, Federal Building
and United States Court House
Syracuse, New York 13202
(315) 423-5165
FTS 8-950-5165

GUSTAVE J. DiBIANCO
Assistant United States Attorney
Northern District of New York
Of Counsel



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